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MICHAEL RODAK, JR.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-949

THE FORT WORTH NATIONAL BANK, INDIVIDUALLY, AND THE FORT WORTH NATIONAL BANK, TRUSTEE UNDER THE WILL OF D. M. COGDELL, DECEASED, FOR THE BENEFIT OF MARION P. COGDELL AND FOR THE BENEFIT OF CHARLOTTE COGDELL ETGEN, *Petitioners*

v.

DAVID MARTIN COGDELL, JR. AND WILLIAM MUNSEY COGDELL, INDIVIDUALLY, AND AS INDEPENDENT EXECUTORS OF THE ESTATE OF D. M. COGDELL, *Respondents*

Petition for a Writ of Certiorari to the Court of Civil Appeals for the 11th Supreme Judicial District of Texas

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Petition for a Writ of Certiorari to the Court of Civil Appeals for the 11th Supreme Judicial District of Texas

Petitioners respectfully pray that a Writ of Certiorari be issued to review the final judgment of the Court of Civil Appeals for the 11th Supreme Judicial District of Texas.

Opinion Below

The judgment and opinion of the Court of Civil Appeals for the 11th Supreme Judicial District of Texas (Appendix A infra) is reported at 482 S.W.2d 337. On October 4, 1972, the Supreme Court of Texas dis-

missed Petitioners' application for writ of error for want of jurisdiction, and Petitioners' motion for rehearing was overruled on November 1, 1972. There is no written opinion by the Supreme Court of Texas.

Jurisdiction

The Texas Supreme Court dismissed application for writ of error for want of jurisdiction on October 4, 1972. Petitioners' Motion for Rehearing was overruled on November 1, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Questions Presented

(1) When a national bank is required under a state venue statute to file suit outside the county of its residence, does the national bank waive its right to be sued in the county of its residence under 12 U.S.C. §94 as to any counter-claim which may be filed in such suit?

(2) If a national bank acting in a fiduciary capacity waives its right to be sued in the county of its residence, does this also constitute a waiver by the national bank in its individual corporate capacity of its right to be sued in the county of its residence under the provisions of 12 U.S.C. §94?

Statutes, Federal Rules and Regulations Involved

The pertinent statute involved herein is 12 U.S.C. §94 which provides:

> " . . . actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held

within the district in which such association may be established, or in any state, county or municipal court in the county or city in which said association is located having jurisdiction of similar cases."

Statement of the Case

This suit originated as Cause No. 9730 in the District Court of Scurry County, Texas, 132nd Judicial District, as a suit by The Fort Worth National Bank, Trustee under the will of D. M. Cogdell, deceased, for the benefit of Marion P. Cogdell and for the benefit of Charlotte Cogdell Etgen, against Jonisue Cogdell Bowden Stiff, William Munsey Cogdell and David Martin Cogdell, Jr., Executors of the Estate of D. M. Cogdell, deceased. Suit was filed on August 5, 1968. The Bank acting in its capacity as Trustee under the will of D. M. Cogdell will be hereafter referred to as "the Trustee." Through its pleadings (Tr. 4), as amended, the Trustee seeks declaratory judgment construing the Will of D. M. Cogdell, judgment sustaining objections to the accounting theretofore filed by the Executors, recovery on behalf of the D. M. Cogdell Estate of claims against the Executors asserted by the Trustee derivatively, judgment surcharging the Executors, recovery of damages from the Executors, distribution of assets of certain corporations controlled by the Executors, and recovery of attorneys' fees and expenses against the Executors. On August 31, 1971, David Martin Cogdell, Jr. and William Munsey Cogdell (hereafter referred to as the majority Executors) filed a third-party action (Tr.45-46) against the Fort Worth National Bank as a defendant in its individual

corporate capacity only. The Fort Worth National Bank in its individual corporate capacity will be hereinafter referred to as "the Bank." The original third-party action filed by the majority Executors was in the nature of a suit for malicious prosecution, claiming that the Bank as Trustee had based its suit upon a frivolous construction of the Will of D. M. Cogdell. However, citation was served only on the Bank. After the trial court construed the Will in a manner which substantially sustained Trustee's position (Tr. 89), thereby demolishing the third-party action for malicious prosecution, the majority Executors amended their pleadings (Tr. 93). The amended pleading, unlike the original third-party action, was filed against the Trustee as well as against the Bank. It alleged an entirely different theory of fraud and deceit instead of malicious prosecution, claiming in substance that both the Bank and the Trustee had deliberately misled the majority Executors and their lawyers as to the manner of construing the Will of D. M. Cogdell. Jonisue Cogdell Stiff, one of the Independent Executors, did not join in either the original third-party action or in the amended pleading of the majority Executors.

The third-party action filed by the majority Executors brought into the case for the first time a new party, the Bank. From August 5, 1968, the date Cause No. 9730 was filed, to August 31, 1971, only the Trustee had been a party to the lawsuit and that was as a party plaintiff.

Both the Bank and the Trustee filed pleas of privi-

lege to be sued in the county of their residence, Tarrant County, Texas, relying on the provisions of 12 U.S.C. §94 (Tr. 69, 103). The District Court overruled the pleas of privilege of both the Bank and the Trustee, and an appeal was taken to the Court of Civil Appeals for the 11th Supreme Judicial District of Texas located at Eastland, Texas. The Court of Civil Appeals held that the "Bank" waived its right to be sued in Tarrant County, Texas, by virtue of having filed suit in the District Court of Scurry County, Texas, relying on general Texas venue law that when one files suit in a county outside his residence he submits himself to venue in that county and waives his right to be sued in his home county as to related matters. The Court of Civil Appeals made no distinction whatsoever between the Bank and the Trustee.

Petitioners then applied for writ of error to the Supreme Court of Texas. The Supreme Court of Texas refused Petitioners' applications for writ of error on the grounds that it had no jurisdiction to hear the case. In this connection the jurisdiction of the Supreme Court of Texas in venue cases is quite limited. Under Article 1728, Revised Civil Statutes of Texas (R.C.S.), and under Article 1821, R.C.S., the jurisdiction of the Supreme Court of Texas in such cases is limited to cases where the opinion of one court of civil appeals is contrary to the opinion of another court of civil appeals or an opinion by the Supreme Court of Texas upon any question of law material to a decision of the case and to cases where the judges of the court of civil appeals may disagree upon any question of law.

Both the Bank and the Trustee took every requisite step under the state venue statutes to assert their right to be sued in Tarrant County, Texas. They both properly filed pleas of privilege to be sued in Tarrant County, Texas, in compliance with Rule 86 of the Texas Rules of Civil Procedure. Said pleas of privilege specifically invoked the provisions of 12 U.S.C. §94. All other pleadings were filed subject to the pleas of privilege in conformance with the Texas venue statutes (Tr. 76, 108). The only act of waiver found by the Court of Civil Appeals was by virtue of the Trustee's having originally filed suit in Scurry County, Texas.

The Bank was named as Trustee in the Will of D. M. Cogdell. Under Texas law it was not required to qualify as Trustee under the authority of any court nor submit accountings to any court. There is no question involved here of the Trustee's submitting to the jurisdiction of the Court by qualifying as Trustee under the supervision of a court, as there was in *Lichtenfels v. North Carolina National Bank*, 260 N.C. 146, 132 S.E. 360 (1963).

Nor is there any issue involved of the failure of the Bank and the Trustee timely to assert their privilege to be sued in Tarrant County, as there was in *First National Bank of Charlotte v. Morgan*, 132 U.S. 141, 10 S.Ct. 37, 33 L.Ed. 282 (1889).

Reasons Relied on For Allowance of Writ

There are two separate but related legal issues involved herein concerning the application of 12 U.S.C. §94 (hereafter sometimes referred to as the National

Bank Venue Statute), neither of which has been specifically determined by this Court and both of which were decided by the Texas courts contrary to the applicable decisions of this Court. *First:* When a national bank is required under a state venue statute to file suit outside the county of its residence, does the national bank waive its right to be sued in the county of its residence as to any counter-claim which may be filed in such suit? *Second:* Assuming, *arguendo*, that in filing suit outside the county of its residence a national bank waives venue as to any counter-claim that might be filed against it, does such action on the part of a national bank acting in its capacity as fiduciary of a trust or estate constitute a waiver on the part of the bank in the event a counter-claim is filed against it in its individual corporate capacity?

The National Bank Venue Statute is mandatory and overrides all state venue statutes. Such was the holding of this Court in *Mercantile National Bank at Dallas v. Langdeau*, 371 U.S. 555, 83 S.Ct. 915, 9 L.Ed.2d 523 (1963). Petitioners do not question the proposition that a national bank *may* waive its right to be sued in the county of its residence. This Court has so held in *First National Bank of Charlotte v. Morgan*, supra. However, Petitioners submit that when a national bank, whether it be acting in a fiduciary capacity or in its individual capacity, is required under a state venue statute to file suit outside the county of its residence, it does not waive its right to be sued as a defendant in its home county. The D. M. Cogdell Estate was administered in the probate court of Scurry County, Texas. Jonisue Cogdell Stiff resided in Albuquer-

que, New Mexico; D. M. Cogdell, Jr. resided in Floyd County, Texas; and W. M. Cogdell was a resident of Briscoe County, Texas, at the time of filing of the suit. Article 1995, R.C.S., governs venue in Texas. It provides that a defendant is entitled to be sued in the county of its residence subject to some thirty exceptions contained therein. Exception No. 6 to Article 1995 provides:

> "If the suit is against an executor, administrator or guardian, as such, to establish a money demand against the estate which he represents, the suit may be brought in the county in which such estate is administered."

Therefore, when the Trustee filed suit, it had its choice of filing suit in either the district court of Scurry County, Texas, the county where the estate was being administered, or the district court of either Briscoe or Floyd County, Texas, where the Executors who were residents of Texas lived.

Although the National Bank Venue Statute dictates venue of suits against a national bank as defendant, it has no application as to venue where a national bank is plaintiff, this being governed by state venue statutes.

As stated in *Buffum v. Chase Nat. Bank of City of New York*, 192 F.2d 58 (7th Cir. 1951):

> "The right of defendant growing out of Section 94 does not differ from other similar rights to be sued only in certain places. It is a personal right and, obviously, may be waived by the conduct of the one to whom it belongs. Waiver is a voluntary

and intentional relinquishment or abandonment of a known existing right or privilege, which, except for such waiver, would have been enjoyed. 67 C.J. 289. It may be expressed formally or it may be implied as a necessary consequence of the waiver's conduct inconsistent with an assertion of retention of the right. And if the only proof of intention to waive rests on what a party does or forbears to do, his act or omissions to act should be so manifestly consistent with and indicative of an intent to relinquish voluntarily a particular right that no other reasonable explanation of his conduct is possible."

The action of the Trustee in filing suit in Scurry County was not the *voluntary* and intentional surrender of a known legal right. If the Trustee were to carry out its fiduciary responsibilities it had to file suit in Scurry County, or if not in Scurry County, then in Floyd County or in Briscoe County. There was simply no way that the Trustee could have brought suit in Tarrant County, Texas, and sustained venue there. In fact, if Trustee had filed suit in Tarrant County, its action would have been frivolous, because venue did not lie in Tarrant County under any theory.

What if Trustee had filed suit in the district court of Tarrant County against the Executors and the Executors had then filed their pleas of privilege and had Cause No. 9730 moved to Scurry or Briscoe or Floyd County? Certainly the Trustee could not be said to have waived venue in such a situation. Is Trustee then to be penalized for having complied with the state venue statute instead of having frivolously filed suit in Tarrant County?

The act of Trustee in filing suit in Scurry County could not be the voluntary and intentional surrender of a known legal right, since the Trustee had no choice in where it filed suit, and it had to file suit if it were to uphold its fiduciary responsibilities. If the opinion of the Court of Civil Appeals is allowed to stand, an exception will be placed in the National Bank Venue Statute which is not in the Act, namely: if a national bank is required under a state venue statute to sue outside the county of its residence, the National Bank Venue Statute does not apply where someone sues the national bank in the lawsuit pending outside the county of the national bank's residence.

Leaving the question of venue against the Trustee and turning to the question of venue as against the Bank, it is to be remembered that the Bank was not a party to Cause No. 9730 until August 31, 1971, when it was served with citation in connection with the so-called "cross action" brought by the majority Executors, which was actually a third-party suit with a new party. Up until this time the only party plaintiff in the lawsuit in Scurry County had been the Trustee. The Court of Civil Appeals held that "The Bank" waived its right to be sued in Tarrant County, Texas, by filing suit in Scurry County, Texas, making no distinction whatsoever between the Bank and the Trustee but treating them as one legal entity.

Petitioners have already discussed the question of waiver. However, leaving the question of waiver aside, Petitioners are unable to see how the Court of Civil Appeals could hold that the Trustee's filing suit in Scurry County, could affect the right of the Bank in

its individual corporate capacity to be sued in Tarrant County. The Bank and the Trustee are two separate and distinct legal entities. That a Bank acting in a fiduciary capacity and a Bank acting in its individual capacity are two separate and distinct entities has been recognized by the Texas courts in *Gray v. Bush*, 430 S.W.2d 258 (Tex.Civ.App. 1968, writ ref., n.r.e.). There the Bank was sued in its capacity as Trustee of the Billy N. Gray Trust, but in his prayer, the Plaintiff sought judgment only against the "Bank" and another party jointly and severally. The Court held that there could be no judgment against the "Bank" because the Bank was not before the Court in its individual capacity but rather only in its representative capacity as Trustee. Even assuming for the moment that the Trustee waived its right to be sued in Tarrant County, how can this possibly constitute a waiver on the part of the Bank? The Bank was not a party to the litigation until brought in by the third-party action of the majority Executors three years after the suit was filed. Surely the Bank has done nothing which would constitute a waiver of its very fundamental right to be sued in the county of its residence!

This Court stated in *Van Reed v. Peoples National Bank*, 198 U.S. 554, 557, 25 S.Ct. 775, 49 L.Ed. 1161 (1905):

> "The right of Congress to determine to what extent a state court shall be permitted to entertain actions against national banks and how far these institutions shall be subject to state control, is undeniable. National banks are quasi-public institu-

> tions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress and are not to be interfered with by state legislative or judicial action, except so far as the law-making power of the government may permit."

In *Mercantile National Bank v. Langdeau*, supra, this court again cited with approval the language used in *Van Reed v. Peoples National Bank.*

As this court held in *First National Bank of Charlotte v. Morgan*, supra, the National Bank Venue Statute was enacted:

> " . . . for the convenience of those institutions, and to prevent interruption in the business that might result from their books being sent to distant counties in obedience to process from state courts."

In the instant cause, if venue against the Bank and Trustee is sustained in Scurry County, the case will be tried at Snyder, Texas, some 220 miles west of Fort Worth, and at least one officer of the Bank and one officer of the Trust Department, together with whatever books and records of the Bank and Trust are subpoenaed, will in all likelihood have to be present in Scurry County for what is bound to be a long trial. The exact situation which the statute was designed to prevent will occur.

The instant cause represents a clear example of a state court's paying lip service to 12 U.S.C. §94 but in reality ignoring the statute and instead looking to state venue law.

If the ruling of the Court of Civil Appeals is allowed to stand, as stated by this court in *Mercantile Bank v. Langdeau*, supra:

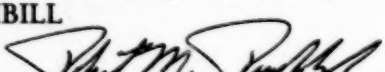
> " . . . such a ruling, of course, would render altogether meaningless a congressional enactment permitting suit to be brought in the bank's home county."

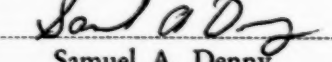
CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LAW, SNAKARD, BROWN & GAMBILL

By: 
Robert M. Randolph

By: 
Samuel A. Denny

1500 Fort Worth Nat'l. Bank Bldg.
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Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, Robert M. Randolph, attorney of record for The Fort Worth National Bank and The Fort Worth National Bank, Trustee Under the Will of D. M. Cogdell, Deceased, Petitioners, do hereby certify that the foregoing Application for Writ of Certiorari has been served upon Respondents, David Martin Cogdell, Jr., and William Munsey Cogdell, by depositing true copies of the same in a United States mail box, postage prepaid, properly addressed to their attorneys of record, Mr. Tom Morris, Gibson, Ochsner, Adkins, Harlan & Hankins, Suite 300, Fisk Building, Amarillo, Texas 79101; and Mr. Gene Dulaney, P. O. Box 217, Snyder, Texas 79549, on this 29 day of December, 1972.

Robert M. Randolph

APPENDIX A

COURT OF CIVIL APPEALS OF TEXAS, EASTLAND.

No. 4541.

The FORT WORTH NATIONAL BANK et al., Appellants,

v.

Jonisue Cogdell Bowden STIFF et al., Appellees.

May 26, 1972.

Rehearing Denied July 14, 1972.

This is a plea of privilege case. D. M. Cogdell was married twice. To the first union were born two children, Charlotte Cogdell Etgen and Marion P. Cogdell. To the second union were born three children, Jonisue Cogdell Stiff, David Martin Cogdell and William Munsey Cogdell. D. M. Cogdell died on the 15th day of November 1964. His children by his second marriage were named Independent Executors of his will and estate and The Fort Worth National Bank was named as trustee of two trusts created for the use of the two children of the first marriage.

The Bank as trustee filed suit in Scurry County against the Independent Executors of the Estate of D. M. Cogdell, deceased. It sought a declaratory judgment construing the will of D. M. Cogdell, this facet of the suit was severed. The Bank also filed objections to the accounting filed by the executors; it asserted a derivative suit in behalf of the estate against William Mun-

sey Cogdell and David Martin Cogdell, Jr., individually; it asserted causes of action for self-dealing by the executors; it asserted a cause of action for breaches of fiduciary duty and for attorney's fees and expenses.

David Martin Cogdell, Jr. and William Munsey Cogdell, individually and as majority executors filed an amended cross-action against the Bank in its individual corporate capacity and against the Bank as trustee and asserted a cause of action for fraud, misrepresentation and deceit. The Bank in its individual corporate capacity and the Bank as trustee filed pleas of privilege which were controverted and overruled by the court. The Bank has appealed and contends the court erred in overruling its pleas.

It relies on 12 U.S.C., Section 94 which provides as follows:

> "§94. Venue of suits
>
> Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

It also contends that Mercantile National Bank at Dallas v. C. H Langdeau, 371 U.S. 555, 83 S.Ct. 520, 9 L.Ed.2d 523, constitutes authority for sustaining its points. The statute and the Mercantile Bank case do establish venue in an original suit filed against a national bank, however, the Bank waives venue as to a

cross-action arising out of or incidental to the subject matter of a suit filed by the Bank in a county outside the county of its residence. In Zachry v. Robertson, 147 Tex. 307, 214 S.W.2d 949 (1948) the Court said:

> "When the plaintiff instituted this suit in Tarrant County he submitted himself to the jurisdiction of the District Court of Tarrant County as to all matters arising out of or incidental to the subject matter of the suit, and thereby waived his right to be sued in the county of his domicile in a cross-action arising out of such cause of action."

We hold that the matters asserted in the cross-action relate to matters arising out of or incidental to the subject matter of the suit filed by the Bank in Scurry County. The appellants' points are overruled.

The judgment is affirmed.

APPENDIX B

IN THE 132ND JUDICIAL DISTRICT COURT
IN AND FOR
SCURRY COUNTY, TEXAS

No. 9,730

THE FORT WORTH NATIONAL BANK, TRUSTEE Under the Will of D. M. Cogdell, Deceased, for the Benefit of MARION P. COGDELL and CHARLOTTE COGDELL ETGEN,
Plaintiffs,

vs.

JONISUE COGDELL BOWDEN STIFF, WILLIAM MUNSEY COGDELL and DAVID MARTIN COGDELL, JR., Executors of the Estate of D. M. Cogdell, Deceased,
Defendants.

ORDER OVERRULING PLEAS OF PRIVILEGE

On the 2nd day of December, 1971, after due setting, came on to be heard the pleas of privilege of THE FORT WORTH NATIONAL BANK, Individually and as Trustee of the MARION P. COGDELL and CHARLOTTE COGDELL ETGEN Trusts with respect to the cross-action of WILLIAM MUNSEY COGDELL and DAVID MARTIN COGDELL, JR., Individually and as Majority Executors of the Estate of D. M. Cogdell, Deceased; and the Court, having duly considered such pleas of privilege, the controverting pleas and the briefs and arguments of counsel, is of the opinion that such pleas of privilege should be overruled.

IT IS THEREFORE ORDERED that such pleas of privilege be and they are hereby overruled, to which action of the Court THE FORT WORTH NATIONAL BANK, Individually and as Trustee, duly excepted and gave notice of appeal to the Court of Civil Appeals for the Eleventh District of Texas at Eastland, Texas.

RENDERED in open court December 2, 1971, and SIGNED December 30, 1971.

/s/J. H. STARLEY
J. H. Starley
Judge Presiding